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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 206

VIVEN HARRIS,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinions in the New York Court of Appeals are printed at 25 N.Y. 2d 175 (1969) (A. 113-16).*

The opinions at the Appellate Division, 2d Department, are printed at 31 App. Div., 2d 828 (1969) (A. 106-11).

The Trial Court rendered no written opinion.

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*(A. ___) Denotes Appendix; (R. ___) Denotes Record.

JURISDICTION

The affirming of petitioner's conviction by the New York Court of Appeals is a determination by the highest state court in which a decision could be had. The jurisdiction of this Court is invoked under 28 *U.S.C.* section 1257(3), petitioner claiming rights, privileges, and immunities under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK STATUTES INVOLVED

CODE OF CRIMINAL PROCEDURE

SECTION 813-f. CONFESSIONS AND ADMISSIONS; NOTICE BEFORE USE. In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel. (L 1965, ch 846, effective July 16, 1965.)

SECTION 813-g. THE MOTION IN GENERAL.- A person claiming to be aggrieved by an involuntary confession or admission may move for the suppression of such confession or admission from use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the confession or admission shall not be admissible in evidence in any criminal proceeding against the moving party. The order granting such motion may be reviewed on appeal.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is pre-

dicted upon a plea of guilty. (L. 1965, ch. 846, effective July 16, 1965)

QUESTIONS PRESENTED

1. Whether the impeachment use of defendant's concededly unconstitutionally obtained statement violated petitioner's rights under the Fifth (self-incrimination), Sixth (effective assistance of counsel), and Fourteenth (due process) Amendments to the United States Constitution?

2. Whether the *interpretation of and application to petitioner* of section 813-f of the New York Code of Criminal Procedure *by the New York Court of Appeals* violated petitioner's due process rights under the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Petitioner was charged in a two count indictment (A. 17) with two sales of a narcotic drug occurring on January 4, and 6, 1966. After trial, the jury convicted petitioner on the second count only. It was unable to reach a verdict as to the first count (A. 103-04) which was later dismissed by the court for lack of prosecution (A. 121).

On behalf of the prosecution, Detective Bermudez, who operated undercover in the City of New Rochelle, testified that he made two purchases of a narcotic drug from petitioner on January 4th and 6th of 1966. A police chemist testified as to each date that the powder contained at least traces of a narcotic drug (no quantitative tests were made). Detective Bermudez's partner, Detective Parks, confirmed only insignificant details of Detective Bermudez' testimony and did not witness either of the alleged sales. No other witness testified against petitioner.

Taking the stand in his own behalf petitioner rebutted the Bermudez testimony. He denied any sale at all on the 4th of January, 1966. (A. 24, 25, 40) He also testified that

Bermudez had been given baking soda by his friend in two discarded glassine envelopes on the 6th day of January, 1966. (A. 30-31) His direct testimony contained no mention of any post-arrest statement. (A. 19-35) In an attempt to minimize petitioner's testimony the prosecutor deliberatedly resorted to cross-examination by the impeachment use of a concededly unconstitutionally obtained statement. (A. 57-65)

As to each count, the jury was obliged to resolve the conflicting versions given by petitioner and Bermudez. The outcome of the trial depended directly and solely upon the credibility accorded these two witnesses by the jury.

The illegal statement was obtained in the following manner: On the day after the second alleged sale, petitioner was taken into custody and interrogated at the District Attorney's office. Petitioner was 23 years old with a tenth grade education (A. 15), indigent, addicted (A. 23) and suffering from lack of drugs (A. 59) and possibly from the after effects of a serious accident (A. 64). In addition, the statement in question itself discloses that petitioner was interrogated off the record prior to the recorded statement (A. 74), at which time he received no advice whatever of his rights according to the trial Assistant District Attorney, Mr. Facelle (A. 66 at Fol. 462) who was the same Assistant District Attorney who took petitioner's statement (A. 72). Thereafter, his stenographic statement, unsigned, was taken down despite his request for counsel and his reluctance to talk in the presence of the stenographer. (A. 74) His statement was marked as People's Exhibit 6 for Identification (A. 65) and later in evidence (R. 541).[1] The contents of petitioners statement was virtually completely disclosed to the jury by the prosecutor who read from the document in his hand (A. 57) extensively in his oral cross-examination.

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[1]Petitioner concedes that the statement was marked in evidence by the trial court solely to preserve it as part of the record on appeal and that the statement was not physically submitted to the jury on paper.

He thus conveyed verbatim the contents of both questions and answers of substantially the entire statement (A. 57-65). It is conceded that the jury convicted on the second count solely by reason of the illegally obtained statement which was particularly prejudicial as to that count.[2]

As to count one (January 4, 1966) the statement contradicted petitioner's direct testimony as to the alleged offense itself and not as to collateral matters (A. 58). However, it was not severely damaging since it presented petitioner only as an agent (of Detective Bermudez) who received no benefit for himself, and the court charged the jury that if defendant acted only as an agent for the detective, he would not be liable for the crime (A. 96). However, as to the second count, (January 6, 1966), on which he was convicted, petitioner's statement was particularly directly incriminating. His trial testimony was that he and a friend had given Detective Bermudez baking soda in order to "beat him" out of $12.00 (A. 30). The statement[3] as disclosed to the jury (A. 62) indicated that petitioner had gotten not only the $12.00 but also a "teste" or half bag of heroin, which would have been of no value whatever to petitioner if the bags contained baking soda. The statement as introduced thus impeached petitioner's testimony as to the events of January 6, 1966 directly, not collaterally. It was introduced by the District Attorney on the theory expressly argued in each of the courts below that the prosecution had an absolute right to utilize unconstitutionally obtained evidence for im-

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[2] "The only point upon which a distinction could have been drawn between a conviction on one charge and a disagreement on the other had to be the impeaching statement, for it and it alone distracted from the defendant's credibility. Consequently, the respondent will concede that if this appeal is found to turn solely on the question of whether or not the use of the statement constituted harmless error, the judgment will have to be reversed." (Respondent's Brief, New York Court of Appeals, page 8.)

[3] All of the portions of the illegal statement relevant to the count on which petitioner was convicted, were obtained subsequent to his fruitless request for counsel.

peachment purposes without limitation to collateral matters and without any claim that petitioner had waived his right against self-incrimination or opened the door in any way to such testimony. Petitioner had not mentioned his interrogation at any time during his direct testimony (A. 19-35).

After petitioner was found guilty on the second count he was sentenced to an indeterminate term of six to eight years in State's prison. Petitioner was confined at all times from his arrest on January 7, 1966, until July 22, 1970, at which time he was released on parole, which is his present status.

It is petitioner's contention that his conviction should be reversed because it was obtained by prejudicial use of an illegally obtained statement inadmissible for any purpose.

ARGUMENT

IMPEACHMENT USE OF PETITIONER'S UNCONSTITUTIONALLY OBTAINED STATEMENT VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION.

Point I

The Basic Illegality of the Statement Itself

The statement in question (A. 72-78) was taken from petitioner after his arrest (A. 73) in the presence of three Assistant District Attorneys, two other law enforcement officers, and the District Attorney's stenographer at the Office of the District Attorney in the County Courthouse (A. 72). It was taken at a "critical stage" of the prosecution and at a time when petitioner was entitled to counsel, *Escobedo v. Illinois*, 378 U.S. 478, and to be advised of his constitutional rights under this Court's decision in *Miranda v. Arizona*, 384 U.S. 436. The statement was taken without adequate *Miranda* warnings in the opinion of the trial judge (A. 66) who was the judicial officer charged with determining this before the statement could be admitted.

Miranda v. Arizona, 384 U.S. at 477; *Jackson v. Denno*, 378 U.S. 368.

In addition, the statement itself showed prior questioning (A. 74) in the absence of the stenographer. The District Attorney who tried the case and also took the statement conceded, in response to the court's question, that there had been no other or additional warnings than those held ineffective in the statement itself (A. 66). The trial took place after the effective date of the decision in *Miranda* (A. 5 et seq). Prior to any questioning as to the count on which he was convicted, defendant requested counsel before continuing (A. 74). After further brief discussion about the charges against him, the interrogating Assistant District Attorney warned him to worry about himself (A. 74), and then, in clear violation of *Escobedo* and of *Miranda*, 384 U.S. at 473-74, the questioning continued to its inevitable conclusion.

The very same Assistant who took the statement and prosecuted petitioner at the trial also made the determination, after a "measured evaluation", that "any use which might have been attempted to be made of it on the prosecution's direct case would have been improper". (Respondent's brief in the New York Court of Appeals, Pages 3 and 4.) This evaluation was endorsed by respondent in its briefs in both the Appellate Division and the Court of Appeals and accepted by both courts (A. 108, A. 113). It was concurred in by the trial judge (A. 66), and conceded also in this Court "the District Attorney's Office, because the defect is a glaring one, came to precisely the same conclusion, that it was involuntary and inadmissible" (brief in opposition to petition for certiorari, page 10).

Point II

Illegal Evidence is Inadmissible for any Purpose

By its decision herein, the New York Court of Appeals has enshrined in New York jurisprudence a fundamental failure to distinguish between merely *irrelevant* evidence and evidence which is *illegal* and thus, inadmissible for any purpose. Under familiar rules of evidence, a defendant who takes the stand in his own behalf places his credibility in issue thereby *making relevant* his otherwise irrelevant *legally obtained* prior convictions and allowing his impeachment thereby. However, by exercising his constitutional right to testify in his own behalf, a defendant does not miraculously render benign, or unoffensive to the constitution, the manner in which his statement was illegally obtained.[4] Indeed, the exact opposite is aptly demonstrated by this Court's decision in *Burgett v. Texas*, 389 U.S. 109, where *illegally* obtained convictions (in derogation of the right to counsel), sought to be used to impeach, were properly held inadmissible either "to support guilt or enhance punishment" 389 U.S. at 115.

The impeachment procedure employed in the instant case not only violated but completely emasculated the protection afforded petitioner by the Constitution and by the *Escobedo* and *Miranda* decisions. Defendant got neither the benefit of his right to counsel nor the full and complete warnings to which he was constitutionally entitled. Rather than vindictate these rights, the state courts have elevated this deprivation into a rule that encourages police officers and prosecutors (as in the instant case) and even judges (*People*

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[4]It is thus possible to "open the door" to evidence otherwise inadmissible because irrelevant, but it is not possible in this way to render constitutionally obtained that which has been illegally extracted. It simply cannot logically be said that such evidence is, or can be, made admissible by opening the door. This is so because no amount of testimony by a defendant, truthful or untruthful, and even as to extraneous matters, cures an illegal or unconstitutional extraction of evidence in violation of the right to counsel or the privilege against self-incrimination.

v. Boodie, 26 N.Y. 2d 779) to flagrantly violate the constitutional prohibitions in the hope that the fruits of such violations will be rewarded, either by impeachment use or by deterring a defendant from exercising his constitutional right to testify in his own defense. Federal officers have been forbidden such subterfuge by this Court's refusal to sanction such conduct (*Massiah v. United States*, 377 U.S. 201), *even where the incursion has resulted in a conviction*, in derogation of the right to counsel. (*Burgett v. Texas*, 389 U.S. 109.)

Whether the proper constitutional standard here applicable protects the rights "implicit in the concept of ordered liberty" or the rights "incorporated" through the fourteenth amendment, it is abundantly clear that petitioner's right to counsel, his privilege against self-incrimination and his due process rights are applicable to the states at this time. *Gideon v. Wainwright*, 372 U.S. 335; *Pointer v. Texas*, 380 U.S. 400; *Simmons v. United States*, 390 U.S. 377; *Malloy v. Hogan*, 378 U.S. 1. These rights can only be vindicated by the absolute prohibition of the use against petitioner of evidence concededly obtained by their violation. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all". (*Silverthorne Lumber Co. v United States*, 251 U.S. 385, at 392). "Circumvention of constitutional liberties is not to be encouraged by permitting the entry of illegally obtained evidence through the back door". (*People v. Burkett*, 235 A.2d 161, at 167 (Pa., Hoffman, J. concurring). "A contrary rule would unconstitutionally chill exercise of either the constitutional right to have evidence suppressed or the constitutional right to take the stand". (*People v. Marsh*, 165 N.W. 2d 853, 861, 14 Mich. App. 518 (1968)).

The conclusion that illegally obtained evidence is inadmissible for any purpose is consistent with the majority rule prevailing in this country, Annot: *Impeachment of*

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accused as witness by use of in *of involuntary or not properly qualified confession*, 89 ALR 2d 478, 479-80 (1963), with the prior determinations of this of this court, *Angello v. United States*, 269 U.S. 20; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; *Mapp v. Ohio*, 367 U.S. 643; and with its recent decisions as well. *Miranda v. Arizona*, 384 U.S. at 477, *Burgett v. Texas*, 389 U.S. 109; *Simmons v. United States*, 390 U.S. 377.

This rule effectuates the requirement that the police must obey the law while enforcing the law. Else, in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. *Spano v. New York*, 360 U.S. 315, 320-21; *Jackson v. Denno*, 378 U.S. 368, 386.

Point III

Neither Reason Nor Precedent Support Impeachment Use of Illegally Obtained Evidence

The respondent herein relies upon impeachment use as an apparent exception to the general rule forbidding the use of illegally obtained evidence. However, the ruling in the Court below, based upon *Walder v. United States*, 347 U.S. 62, and *People v. Kulis*, 18 N.Y. 2d 315, does not stand upon any authority firmly implanted in our law, nor does it accord with the logical distinction between illegal and irrelevant evidence referred to in Point II, supra.

To begin with, the majority rule in this country since at least 1894 (*Shephard v. State*, 88 Wis. 185, 59 N.W. 449) has been that an involuntary or otherwise unqualified confession may not be used to impry or otherwise unqualified contakes the stand in his own behalf impeach an accused person who *of accused as a witness by use* behalf. Annotation: *Impeachment qualified confession*, 89 ALR 2*use of involuntary or improperly* addition, this Court in *Agnello v.* LR 2d 478, 479-80 (1963). In reached a consonant result. See *llo v. United States*, 269 U.S. 20, *Co. v. United States*, 251 U.S. 3See also, *Silverthorne Lumber* .S. 385.

Walder v. United States, 347 U.S. 62, relied on by the New York Court of Appeals as authority for *Kulis* was this Court's only departure from the general rule, in that it sanctioned impeachment use of defendant's statement made in support of a motion to suppress in a prior criminal proceeding, apparently on the theory that the defendant by his protestations of innocence unrelated to the charge on trial had opened the door to such impeachment as to collateral matters. The underlying rationale of *Walder* was, of course, that the evidence necessarily furnished by the accused himself on his successful motion to suppress illegal evidence was admissible against him on a subsequent occasion.[5] Constitutional developments since that time have eliminated this necessary foundation of *Walder*.

In *Simmons v. United States*, 390 U.S. 377, returning to a rationale consistent with *Agnello*, *Silverthorne* and other similar decisions, it was expressly held by this Court that testimony obtained from an accused in the course of his vindication of a constitutional right could not subsequently be used against him without violating his privilege against self-incrimination. Thus, effectively undercutting the rationale upon which *Walder* was dependent. Accord, *People v. Luna*, 226 N.E. 2d 586, 590, 37 Ill. 2d 299 (1967).

In *Miranda v. Arizona*, 384 U.S. 436, this Court consistent therewith, determined that statements obtained in violation of that decision, although "merely intended to be exculpatory by the defendant are often used to impeach his testimony . . . and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." Id. at 477. Six Federal Circuit Courts are unanimous in the opinion that the last quoted decision effectively vitiates the application of *Walder* to the fact pattern presented by this

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[5] *Walder* also failed to distinguish between irrelevant and inadmissible evidence.

case. *Proctor v. United States*, 404 F.2d 819 (D.C. Cir. 1968); *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968); *United States ex rel. Hill v. Pinto*, 394 F.2d 470 (3d Cir. 1968); *Breedlove v. Beto*, 404 F.2d 1019 (5th Cir. 1968); *Groshart v. United States*, 392 F.2d 172 (9th Cir. 1968); *Wheeler v. United States*, 382 F.2d 998 (10th Cir. 1967). See also, *Gilday v. Scafati*, No. 7521 (1st Cir., June 25, 1970), (by implication).

A majority of the highest courts of our states strongly favor this conclusion. *State v. Brewton*, 247 Ore. 241, cert. den 387 U.S. 943 (1967); *Commonwealth v. Padgett*, 428 Pa. 229 (1968); *Gaertner v. State*, 35 Wis. 2d 159 (1968); *People v. Barry*, 237 Cal. App. 2d 154 (1965), cert. den., 386 U.S. 1024 (1967); *Commonwealth v. Robinson*, 239 A.2d 308, 428 Pa. 458 (1968); *Franklin v. State*, 252 A.2d 487 6 Md. App. 572 (1969); *People v. Luna*, 226 N.E. 2d 586, 37 Ill. 2d 299 (1967); *People v. Marsh*, 165 N.W. 2d 853 14 Mich. App. 518 (1968); *People v. Wilson*, 174 N.W. 2d 79 20 Mich. App. 410 (1969); *Cardwell v. Commonwealth*, 164 S.E. 2d 699 (Va. 1968); *State v. Galasso*, 217 So. 2d 326 (Fla. 1968); See also *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533, 89 ALR 2d 461; *Contra, People v. Harris*, 25 N.Y. 2d 175; *People v. Kulis*, 18 N.Y. 2d 315; *State v. Kimbrough*, 262 A.2d 232, 109 N.J. Super 57 (1970); *State v. Butler*, 19 Ohio St. 55, 249 N.E. 2d 818 (1969). The courts which favor the rule contended for by petitioner also include a number of Federal District Court opinions, among them *United States v. Prebish*, 290 F. Supp. 268, 276-75 (D.C. Fla. 1968); *United States v. Birrell*, 276 F. Supp. 798, 817 (S.D.N.Y. 1967).

If, as we urge, *Walder* is no longer good law "then, of course, the rationale of *People v. Kulis*, 18 N.Y. 2d 318, depending, as it does, on *Walder* will no longer be valid, and this case now before the Court is indefensible . . ." Brief in opposition to petition for certiorari, page 2.

It is respectfully noted that *Kulis* was a pre-*Miranda* case in which the *per curiam* opinion declined to apply *Miranda*

retroactively, over a strong dissent suggesting a contrary result in view of *Miranda*. In its *per curiam* opinion herein the New York Court of Appeals gave no explanation whatever of its reasoning with regard to the effect of *Miranda* on the validity of *Walder* or *Kulis*. Extensive reasoning on this point has, however, been the product of consideration of the question by the Federal Courts of Appeal.

The Second Circuit now holds that, ". . . it is absolutely plain that the Court intended to lay down a firm general rule with respect to the use of statements unconstitutionally obtained from a defendant in violation of *Miranda* standards. The rule prohibits the use of such statements, whether inculpatory or exculpatory, whether bearing on guilt or on collateral matters, only, and whether used on direct examination or for impeachment." *United States v. Fox*, 403 F.2d 97, 102 (1968).

The Third Circuit agrees that, ". . . coerced statements obtained from a defendant or statements taken in violation of *Escobedo* may not be used to impeach his credibility . . ." *U.S. ex rel. Hill v. Pinto*, 394 F.2d 470 (1968).

The Ninth Circuit squarely holds that, ". . . if statements are obtained from a defendant in violation of the *Miranda* rules and if the interrogation relates to an offense for which the defendant is ultimately brought to trial, these statements, as well as any portions thereof, may not be used against the defendant at the trial for any purpose whatsoever . . ." and "Insofar as *Walder* would compel a different result, it has, we believe, been undermined by the Supreme Court's *Miranda* decision". *Groshart v. United States*, 392 F.2d 172, 178 (1968).

The District of Columbia Circuit holds that *Walder* "does not apply to evidence obtained in violation of *Miranda*", *Proctor v. United States*, 404 F.2d 819 (1968, reh. den. 1969).

The Federal District Court in Florida points out that there are ". . . very strong reasons for questioning the result reached in *Walder*" and notes "growing realization that *Wal-*

der was a bad decision. In short the reasons against *Walder* have finally come to outweigh the reasons in favor of it." *United States v. Prebish,* 290 F. Supp. 268, 274-75 (1968).

The Federal Court for the Southern District of New York, in an early but prophetic opinion, notes that recent decisions (including the dissent in *Kulis* itself) have cast doubt on the validity of *Walder* and holds that, "because the precedental authority of *Walder* has been so seriously attenuated and because the trend of current constitutional development points in another direction, this court respectfully declines to follow *Walder*. The government should be restricted to using untainted evidence in the impeachment of witnesses, just as it is similarly restricted in making out its direct case." *United States v. Birrell,* 276 F. Supp. 798, 817 (1967).

Cases such as *United States v. Curry,* 358 F.2d 904, are simply "no longer governing law" in their own circuits. *United States v. Fox,* 403 F.2d 92, 102-03 (2 Cir. 1968). *Walder* itself "in the light of *Miranda* . . . is no longer controlling" (Id. at 103). *Waider* "does not apply to evidence obtained in violation of *Miranda*". Proctor v. United States, 404 F.2d 819, 821 (D.C. Cir. 1968, reh. den. 1969). This result is amply supported not merely by the cited precedents but by reason as well.

By comparison, the ruling of the New York Court of Appeals in this case disproportionately places a higher priority upon frustrating an alleged liar then upon vindicating fundamental constitutional rights. Its consequences are:

> (a) to provide encouragement and incentive to law enforcement officers to devise ever increasingly subtle methods for encroaching upon fifth, sixth, and fourteenth amendment rights by rewarding them with impeachment use of unconstitutionally obtained evidence or by effective frustration of a defendant's constitutional right to testify;
>
> (b) it fails to provide any vindication whatever for the constitutional rights which, as in petitioner's case, have been *concededly* violated;

(c) it forces an impermissible choice between the constitutional right to testify and the privilege against self-incrimination; the *Harris* holding directly conflicts with several decisions of this Court which forbid compelling the waiver of a constitutional right as a condition of exercising another legal right. Thus, in *Green v. United States*, 355 U.S. 184, this Court condemned the attempted compulsion of a waiver of the privilege against double jeopardy as the price of a successful appeal. In *United States v. Jackson*, 390 U.S. 470, this Court condemned the compulsion of the waiver of the right to trial by jury in order to avoid the dealth penalty. In *In re Winship*, 397 U.S. 358, this Court condemned an incursion on the due process right to proof beyond a reasonable doubt as the price of youthful offender treatment. In *Simmons v. United States*, 390 U.S. 377, this Court condemned an attempted compulsion of the waiver of the privilege against self-incrimination as the price for exercising a valid fourth amendment right to suppress evidence illegally seized. In the instant case, the New York Court of Appeals has compelled petitioner to waive his privilege against self-incrimination in order to exercise his right to testify in his own behalf. This "Hobson's Choice" is constitutionally impermissible under the decisions cited above. See also *People v. Luna*, 226 N.E. 2d 586, 37 Ill. 2d 299 (1967) and *People v. Marsh*, 165 N.W. 2d 853, 861, 14 Mich. App. 518 (1968).

(d) it avoids any pre-trial determination of voluntariness under *Jackson v. Denno* by the prosecutor's merely determining to use such illegally obtained evidence solely to impeach, and allows the prosecution to surprise the defendant who takes the stand (or at least his counsel) or to intimidate or deter a defendant from taking the stand. It eliminates a critical stage of the prosecution (*Jackson v. Denno* hearing) at the whim of the prosecutor who, depending on the amount of other evidence available to

him, can now attempt to use questionably constitutionally obtained evidence in this manner to achieve the element of surprise while at the same time avoiding a possible adverse determination.

(e) It raises a serious problem in light of *Bruton v. United States*, 391 U.S. 123, in that it is difficult to conceive, as in the instant case, of the jury limiting this type of evidence solely to the issue of defendant's credibility even under proper instructions. Both this Court in *Miranda*, 384 U.S. at 477, and the First Circuit in *Gilday v. Scafati*, No. 7521 (1st. Cir., June 24, 1970) have recognized that the purpose and implication of such evidence is to prove guilt itself. Moreover, in the instant case, a very learned and experienced trial judge who correctly charged the rule applicable to such evidence (A. 95 Fol. 575), nevertheless, also demonstrated his basic confusion with the rule confining such impeachment evidence to credibility. Thus, with regard to the first count of the indictment, Detective Bermudez testified that the defendant voluntarily made a sale to the detective (R. 92-100). The defendant testified on direct and on cross that there was no sale *at all* by defendant on the 4th of January (A. 24, 25, 40). The only evidence that petitioner acted as the detective's agent came from the statement itself (A. 75, 76) utilized on cross-examination solely to impeach credibility (A. 58, 59). The Court, nevertheless, charged that the jury could make a substantive (guilt or innocence) finding of agency (A. 96 Fol. 577), despite the fact that the only evidence of this was admitted solely to impeach defendant's credibility and not to prove guilt or innocence (A. 95). If the learned Court had such difficulty, then "to expect that the jury could wipe this from its memory and decide the petitioner's guilt only on the basis of the evidence [admitted for that purpose] is to place too much faith in a jury's ability to detach itself from reality." *Burgett v. Texas*, 389 U.S. 109, at 119 Chief Justice Warren, concurring).

(f) The rule applies harshly and unequally to indigent, illiterate, inexperienced, and youthful defendants who have no knowledge of their rights and who therefore need these rights the most, while at the same time having no effect upon professional criminals and recidivists. This point is no mere conjecture. It was urged by the National District Attorneys Association in *Miranda* itself. *Miranda v. Arizona*, 384 U.S. at 470.

(g) It implicates state courts and constitutes state action in direct violation rather than vindication of the constitutional rights involved.

(h) It degenerates into haphazard and unequal application of the rules relating to harmless error, collateral versus direct impeachment, opening the door and, finally, as in the New York Court of Appeals in this very case, subjective value judgments as to whether the statement was more or less incriminating than the petitioner's testimony.

(i) Inherent in the rationale behind the Harris rule is the suggestion that the defendant lied, either at the time of his statement or at the trial. (Brief in opposition to petition for certiorari, page 6.) This is a completely impermissible consideration in determining constitutionality of such a statement. *Rogers v. Richmond*, 365 U.S. 534, 543-44. See Frankfurter, J., dissenting, in *Stein v. New York*, 346 U.S. 156, at 200, quoted with approval in *Jackson v. Denno*, 378 U.S. 368, at 384. "This issue, must be decided without regard to the confirmation of details in the confession by reliable other evidence. The determination must not be influenced by an irrelevant feeling of certitude that the accused is guilty of the crime to which he confessed." See also *Jackson v. Denno*, 378 U.S. at 376-77.

(j) The application of *Kulis* to petitioner also reflects the evil condemned by this Court in *Burgett v. Texas*, 389 U.S. 109 at 119, in which this Court forbid the impeachment use of a counselless conviction either

to prove guilt or to enhance punishment. Since many, if not most, such counselless convictions are obtained upon a plea of guilty, is the ruling in *Burgett* not analogous with post arrest statements made in the absence of counsel? In each case the unconstitutionally obtained matter sought to be used to impeach would directly compound the violation of the right to counsel and the privilege against self-incrimination. In each case, it would deny due process of law.

(k) Under the theory and procedure utilized in this case the jury was never given any instruction of any kind relating to voluntariness. (A. 79-102, see especially A. 95). No determination of voluntariness was made by this jury. Compare, *Jackson v. Denno*, 378 U.S. at 387-88.

For all of the reasons hereinabove set forth, it is respectfully urged that the attempted impeachment exception to the general rule forbidding the use of illegally obtained evidence is unsupported by reason or precedent, is repugnant to the Constitution and the teachings of this Court, and should be rejected in this case.

Point IV

Prejudicial Use Was Made of Petitioner's Statement

Petitioner's statement was used virtually *in toto*. Although not physically exhibited to the jury, the prosecutor by the device of reading questions and answers at length and asking defendant if he made such statements in response to such questions, covered eight pages of the printed record with "excerpts" from defendant's statement. The entire statement consumes only six and one-half pages of the printed record (compare A. 58-65 with A. 72-78). The questions were asked in groups of three and four at a time (see A. 58, A. 59-60, A. 61, A. 62). They conveyed the entire substance of the document from which the prosecutioner was visibly

reading (as he himself observed A. 57). With specific regard to the second count of the indictment, Petitioner was asked (A. 61 through A. 63) all of the questions and answers relating to his sale of two "nickel bags" and his receipt of $12.00 and a "taste" or half bag of heroin occurring the night before the statement was taken from him. All of the portions relating to the second count of the indictment (on which petitioner was convicted) were subsequent in time to his request for counsel which had not been honored (A. 74, A. 75-78).

We think it unquestionable that the portions of the statement utilized in relation to the second count were direct evidence of the crime charged in that count rather than collateral thereto (see, for example, A. 62). They were significantly incriminating on the second count in light of petitioner's direct testimony. Petitioner had testified on direct that he and a friend had given Detective Bermudez baking soda in two discarded glassine envelopes in order to do him out of $12.00 (A. 30). However, the content of petitioner's statement as disclosed (A. 62) indicated that in addition to the $12.00, petitioner had received a "taste" or half bag of heroin which would have been absolutely valueless to the admitted addict petitioner (A. 23) if in fact the glassine envelopes contained only baking soda. This was a fact to which Detective Bermudez had never testified (R. 121; A. 88). It was significantly incriminating and used to prove guilt by implication in any meaningful sense in which those words may be used. *Miranda v. Arizona*, 384 U.S. 436, at 477; *People v. Kulis*, 18 N.Y. 2d 318, at 324 (Keating, J. dissenting); see also *Gilday v. Scafati*, No. 7527 (U.S. First Circuit Court of Appeals, June 24, 1970.) Its use was clearly prejudicial error.

Point V

The Impermissible Use of the Illegal Statement Cannot Be Harmless Error

In the Appellate Division, two Justices found no error and two Justices found reversible error in the impeachment use of defendant's illegally obtained statement. The fifth Judge, Mr. Justice Brennan, held that ". . . it is apparent that the statement pertaining to the events of January 6, 1966, when read before the jury, violated the holding in Kulis-Walder." However, he then held that the constitutional error was "harmless". Both Judge Brennan and the dissenting Justices agreed that the test of harmless error is the standard set forth in *Chapman v. California*, 386 U.S. 18, 24, that a constitutional error is reversible unless "harmless beyond a reasonable doubt". On this point we adopt verbatim the language of Judge Christ, dissenting in the Appellate Division, upon which we cannot improve.

> "An error is not harmless if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (Fahy v. Connecticut, 375 U.S. 85, 86-87). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (Chapman v. California, supra). Surely, it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the January 4, charge (cf. Anderson v. Nelson, 390 U.S. 523, 525). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's." (A. 111, 31 A.D.2d at 831).

In the Appellate Division the respondent had not even suggested the application of harmless error to the fact pattern in this case.

We respectfully suggested in the Court of Appeals that Judge Brennan had utilized the doctrine of harmless error in clear and proper deference to the authority of the Court of Appeals since it was he who granted leave to appeal to that Court. This view was concured in by the respondent, as follows:

"POINT II

If the use of this statement violates the Kulis-Walder Rule, the judgment of conviction should be reversed.

We cannot in good conscience urge upon this Court the position that the use of the statement, if it violated the Kulis-Walder doctrine, was harmless error, and, along with the appellant, we believe and submit to the Court that Mr. Justice Brennan held it to be so simply to bring about an authoritative determination of Kulis-Walder in this Court. The commission of two crimes was unambiguously testified to on the trial by the undercover police officer to whom the sales of narcotics had been made. In each case, the defendant equally unambiguously denied it, although as to the latter sale he said the material he sold was baking soda. The testimony of each was for any effective purpose uncorroborated, and the only point upon which a distinction could have been drawn between a conviction on one charge and a disagreement on the other had to be the impeaching statement, for it and it alone detracted from the defendant's credibility. Consequently, the respondent will concede that if this appeal is found to turn solely on the question of whether or not the use of the statement constituted harmless error, the judgment will have to be reversed." (Respondent's Brief, New York Court of Appeals, page 8).

The New York Court of Appeals opinion contained no reference whatever to harmless error.

It is respectfully urged that on the facts here shown (i.e., the same proof less the improperly utilized statement was insufficient for conviction on the first count) the error cannot be considered harmless. This is not a case where the statement admitted was confined to incidental or collateral matters, nor was the proof of guilt overwhelming. In this case, it is impossible to say with any degree of certainty whatever that the difference in the jury's findings on the two identical counts did not result solely and directly from the single significant variation in the proof-the illegally obtained and improperly utilized statement of the defendant. Such use was prejudicial and reversible error. *Chapman v. California*, supra. Upon less compelling fact patterns, the Federal courts have recognized similar errors as reversible even in the absence of objection. *Proctor v. United States*, 404 F.2d 819, 822 (D.C. Cir. 1968, reh. den., 1969); *Breedlove v. Beto*, 404 F.2d 1019, 1021 (5 Cir. 1968). See also, *United States v. Poe*, 352 F.2d 639 (D.C. Cir. 1965).

Point VI

The New York Court of Appeals Interpreted and Applied Sec. 813-f of the New York Code of Criminal Procedure Unconstitutionally

The respondent contends that petitioner's statement was properly used for impeachment without compliance with Section 813(f) of the Code of Criminal Procedure because "even a judicial ruling that the statement was inadmissible would not be a bar to its use for purposes of impeachment. *People v. Kulis*, 18 N.Y. 2d 318" (respondent's brief in Appellate Division, p. 3).

It is petitioner's contention that the respondent was required to serve the notice pursuant to Section 813(f) and that a judicial ruling of inadmissibility pursuant to Section 813(g) would bar the use of the statement for any purpose. This view was rejected in the Courts below which held that Section 813(f) does not apply to a statement used solely for

impeachment.[6] The statute, however, expressly applies to the offering of any admission (oral or written) into evidence. (consonant with *Jackson v. Denno*, 378 U.S. 368, which was the basic exposition of the constitutional right which requires such legislation. We urge that the statute cannot be interpreted or applied more narrowly than the constitutional right which compelled its enactment). The New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have this issue fairly and reliably determined. *Jackson v. Denno*, 378 U.S. at 389). The federal rule is squarly contrary to the State Court holding in this case. *Breedlove v. Beto*, 404 F.2d 1019 (5 Cir. 1968).

In *Breedlove*, the court noted that the illegal statement was not offered into evidence, was not read to the jury, was not claimed to be involuntary, and that there was no sufficient objection by defense counsel to its impeachment use (404 F.2d at 1021). Nevertheless, the court held squarely that "the statement was injected into evidence by the Dis-

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[6]See, however, N.Y. Criminal Procedure Law, Chapter 996, Laws of 1970 (Effective Sept. 1, 1971) § 60.45 RULES OF EVIDENCE; admissibility of statements of defendants.

1. Evidence of a written or oral confession, admission, or other statement made by a defendant with respect to his participation or lack of participation in the offense charged, may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made.

2. A confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him:

(a) . . . .

(b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:

(i) . . . .

(ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States.

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trict Attorney's use of it during
1022) and that therefore, "the s
ing to pass on the voluntarine
allowing the jury to hear it" (Id.
378 U.S. 368, is dispositive of t
(Id. at 1020) in reversing for pla
proper objection.

It was error for the District A
Section 813(f) notice and therea
ment and its admission in cros
Court should not have permitte
of the contents of defendant's
"that the statement had been
Miranda warnings" (A. 66) and
fendant had requested, but not
counsel. Judge Dempsey expre
tion of the danger of this proce
the prophetic warning of Judge
itself (A. 68).

The respondent conceded tha
tion 813(f) notice "puts the ap
have been following the 813(f
that had been decided most fav
ent's brief in the Appellate Divi
this latter statement is an accur
of the prosecution's failure to s
urge that as a result, the statem
purpose. *United States v. Carig*

In summary, we contend tha
to fail to serve the statutory no
vents the people from making
fendant's statement. We respec
establish the firm rule that a *Ja*
(f) type hearing is requisite to
by the prosecution for any pur
hold such hearing precludes its
any purpose.

ring cross-examination" (Id. at
he state trial judge erred in fail-
riness of the statement before
(Id. at 1022). *Jackson v. Denno*,
of the question said the court
plain error despite the lack of

ct Attorney to fail to serve the
reafter utilize defendant's state-
cross-examination. The Trial
itted the jury to hear any part
t's statement after it determined
en elicited without the full
nd that it was made after de-
not obtained, the assistance of
pressly cautioned the prosecu-
ocedure in view of *Miranda* and
dge Keating's dissent in *Kulis*

that the failure to serve a Sec-
appellant right where he would
13(f) and 813(g) procedures if
favorably to him". (Respond-
Division, p. 2). We agree that
curate description of the effect
to serve the required notice and
tement was inadmissible for any
gnan, 342 U.S. 36, 38.

that it was constitutional error
notice and that this failure pre-
ing any use whatever of de-
pectfully urge that this court
Jackson v. Denno-Section 813
to any admission made use of
purpose and that the failure to
its use in any manner and for

CONCLUSION

For the reasons set forth herein the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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